United Nations

AT

Administr[illegible] Tribunal

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ORIGINAL: FRENCH

ADMINISTRATIVE TRIBUNAL

Judgement No. 728

Case No. 809: TREMPE

Against: The Secretary General of the International Civil Aviation Organization

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, President; Mr. Hubert Thierry; Mr. Mayer Gabay;

Whereas, on 19 August 1994, Gerald Rene Trempe, a former staff member of the International Civil Aviation Organization (hereinafter referred to as ICAO), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 27 September 1994, the Applicant, after making the necessary corrections, again filed an application, requesting the Tribunal:

"To order:

(1) The rescinding of the Secretary General decision [not to renew his appointment beyond 31 December 1992];

(2) [His] reinstatement as a staff member of the International Civil Aviation Organization;

(3) Payment of [his] salary and allowances with interest covering the period from 1st January 1993 up to the end of this litigation during which time [he has] been compelled to remain unemployed;

(4) Payment to UN Joint Staff Pension Fund by ICAO on [his] behalf of the appropriate contributions with interest covering the period 1st January 1993 till the end of this litigation;

(5) Exemplary damages for moral and material injury resulting from misuse of administrative practices and the time limits setting as a trap and a means to catch [him] out, in the range of $65,000 to $95,000;

(6) Appropriate compensation to cover the cost of filing this appeal, in the range of $1,000 to $1,500.

[or]

(i) Payment of the amount equivalent to three years net base salary;

(ii) Exemplary damages for moral and material injury resulting from misuse of administrative practices and the time limits setting as a trap and a means to catch [him] out, in the range of $65,000 to $95,000;

(iii) Appropriate compensation to cover the cost of filing this appeal, in the range of $1,000 to $1,500."

Whereas the Respondent filed his answer on 9 March 1995;

Whereas the Applicant filed written observations on 27 July 1995;

Whereas, on 27 October 1995, the Applicant submitted additional observations and documents;

Whereas, on 29 October and 11 November 1995, the Applicant submitted further documents;

Whereas the facts in the case are as follows:

The Applicant entered the service of ICAO on 27 June 1990 as a Distribution Clerk

at the G-3 level, on a temporary appointment expiring on 12 October 1990. His appointment was extended successively until 31 December 1990, 31 January 1991, 28 February 1991 and 31 December 1991. With effect from 1 January 1992, the Applicant's appointment was extended for one year. He separated from service on 31 December 1992, upon the expiration of his appointment.

In a letter dated 6 November 1992, the Secretary General informed the Applicant: "[Y]our present temporary appointment dated 30 December 1991 will expire on 31 December 1992. The Organization does not intend to offer you a further appointment after that date."

On 6 January 1993, ICAO issued a vacancy notice for recruitment of a Distribution Clerk at the G-3 level. On 13 January 1993, the Applicant applied for the post. On 2 March 1993, the Chief of the Recruitment and Placement Section informed the Applicant that he had not been selected for the post.

In the meantime, on 20 January 1993, the Applicant requested the Secretary General to review the decision, conveyed to him on 6 November 1992, not to renew his appointment. He noted that, on 13 November 1992, he had met with the Chief of the Personnel Branch, who told him that the number of General Service staff had to be reduced. He added that he was then surprised to see that a temporary Distribution Clerk had apparently replaced him and that a vacancy notice had been issued for the post. In a reply dated 27 January 1993, the Secretary General advised the Applicant that "[t]he very nature of a temporary appointment is that it does not carry any expectancy of renewal and expires automatically without further notice". He stated that, at the time of the meeting on 13 November 1992, "it was intended to keep the post vacant", but that subsequently "it was decided to fill the post again" and that another person was recruited "because the supervisors did not express an interest to rehire you". He further noted that although the terms of the Applicant's temporary appointment excluded the appeals procedure set forth in the Staff Regulations and Rules, he would have been prepared to consider a request for appeal if it had been submitted within the prescribed time-limit for one month from notification of the decision. Since the Applicant had not met the deadline, he

was "not prepared to consider [his] request".

On 9 February 1993, the Applicant requested the Secretary General's permission to appeal directly to the Administrative Tribunal. On 18 February 1993, the Secretary General rejected this request. On 15 February 1993, the Applicant lodged an appeal with the Advisory Joint Appeals Board, requesting a waiver of the applicable time-limits.

On 27 April 1994, the Chairman of the Board made the following recommendation to the Secretary General:

> "By letter dated **6 November 1992**, [the Applicant], who had a temporary contract, was informed that his contract which was due to expire on 31 December 1992, would not be renewed. Staff rule 111.1.5 provides that a staff member seeking to appeal must first address a letter to the Secretary General requesting that the decision to be appealed against be reviewed. This letter must be sent within one month of the time the staff member received notification of the decision in writing. In fact, [the Applicant] sought a review of the decision on **20 January 1993** only. Under staff rule 111.1.7, a staff member who fails to observe this time limit loses the right to appeal, unless the delay is waived under rule 111.1.8 which reads:
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> > 'The staff member may request that in view of exceptional circumstances, the delay in filing the appeal be waived. The Board shall examine such request as a preliminary issue and make its recommendations thereon to the Secretary General for his decision.'
>
> ...
>
> On 21 April 1994, the Board carefully reviewed all the relevant facts and circumstances associated with the filing of the appeal including the fact that [the Applicant] claims that he had not been aware that his post was being filled, having been informed by C/PER on 13 November 1992 that the post would in fact not be filled, and **unanimously** recommends that you exercise your discretionary power and waive the time limits in this case so as to enable [the Applicant] to proceed with his appeal."

On 30 May 1994, the Chairman of the Board advised the Applicant as follows:

"I wish to refer to your letter dated 15 February 1993 by which you sought to appeal against the decision of the Secretary General not to renew your contract of appointment and in which you requested a waiver of the applicable time limits, as well as to the subsequent correspondence between the Board and yourself in this regard.

By IOM dated 27 April 1994, the Board unanimously recommended to the Secretary General that he exercise his discretionary power and agree to waive the time limits to enable you to proceed with the appeal. I regret to inform you that the Board was advised by the Secretary General on 13 May 1994 that he did not agree with the Board's recommendation. Consequently, your appeal is not receivable by the Board."

On 27 September 1994, the Applicant filed with the Tribunal the application referred to above.

Whereas the Applicant's principal contentions are:

1. During the 30-day period for appeal following the decision not to renew his appointment, the Applicant believed his post had been abolished, and was not aware that he had grounds for appeal. Because he was misled by the Respondent, the time-limit should not be applied to him.

2. The Respondent has acted in bad faith and, by failing to follow a reasonable procedure, has displayed arbitrariness.

Whereas the Respondent's principal contentions are:

1. The application is not receivable as it does not comply with the requirements of article 7 of the Statute of the Tribunal.

2. The Applicant failed to observe the time-limit for appeals, and the Respondent acted within his discretionary powers when he decided that there were no exceptional circumstances justifying a waiver of the time-limit.

The Tribunal, having deliberated from 1 to 21 November 1995, now pronounces the following judgement:

I. Having received notification, on 6 November 1992, that his appointment would be expiring at the end of the year and that the Administration did not intend to renew it, the Applicant addressed a letter to the Secretary General, on 20 January 1993, requesting that the decision be reviewed. It has not been denied that the Applicant's request was late; it was submitted after the one-month time-limit laid down in ICAO staff rule 111.1.5, after which the right to appeal is lost.

II. In the course of a meeting on 13 November 1992, the Chief of the Personnel Branch of ICAO informed the Applicant that the reason why his appointment was not being renewed was that his post was being abolished as part of a reduction in staff. Early in 1993, however, the Applicant noted that that was not the case and that someone had been appointed to replace him.

III. Having received an appeal from the Applicant dated 15 February 1993, the Advisory Joint Appeals Board requested the Secretary General to exercise his power, under staff rule 111.1.8, to waive the time-limit laid down in staff rule 111.1.7, in view of the "exceptional circumstances". The Secretary-General refused, however, to follow the Board's recommendation to waive the time-limit. Consequently, the Board was not able to consider the Applicant's case.

IV. The Applicant requests the Tribunal to rescind the Secretary General's decision not to waive the time-limit. In the opinion of the Tribunal, the Secretary General enjoys discretionary power to determine whether "exceptional circumstances" exist that would justify a waiver of the time-limit laid down in staff rule 111.1.7. In earlier rulings, the Tribunal has

held (Judgement No. 527, *Han* (1992)) that only a decision by the Secretary General tainted by errors of law or fact, arbitrariness or discrimination would prompt the Tribunal to censure the decision; moreover, it would be for the Applicant to show that the decision was tainted by one of those defects. That has not happened in this case.

V. If the Chief of the Personnel Branch - and this has not been confirmed - gave inaccurate information to the Applicant, that was wrong. Nevertheless, in the circumstances, the Secretary General was within his rights in concluding that there was no justification for waiving the time-limit.

VI. For the foregoing reasons, the Tribunal rejects the application.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Mayer GABAY
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary

United Nations

AT

Administrative Tribunal

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LIMITED

AT/DEC/729
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ADMINISTRATIVE TRIBUNAL

Judgement No. 729

Case No. 788: VORONINE

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of Mr. Jerome Ackerman, presiding; Mr. Hubert Thierry; Mr. Francis Spain;

Whereas, on 17 March 1994, Alexandre Voronine, a former staff member of the United Nations, filed an application requesting the Tribunal, *inter alia*:

"...

2.2 To rescind the decision taken on behalf of the Secretary-General to separate the Applicant from service with effect of 7 February 1993 ...;

2.3 To order the reinstatement or re-employment of the Applicant with the Secretariat as of 8 February 1993;

2.4 To fix the amount of compensation payable to the Applicant for the injury sustained should the Secretary-General decide that the Applicant shall be compensated without further action being taken in his case;

2.5 To uphold the finding of the Joint Appeals Board that the Applicant has been injured by reason of unfair treatment, ... and to order the Respondent to pay the Applicant for the injury sustained by him ..., compensation at not less than the equivalent of 18 months' net base salary."

Whereas the Respondent filed his answer on 18 September 1994;

Whereas the Applicant submitted a request for the production of documents on 27 September 1994;

Whereas the Respondent submitted additional documents on 29 November 1994;

Whereas the Applicant filed written observations on 29 December 1994;

Whereas the Applicant filed additional observations on 26 January 1995;

Whereas, on 28 July 1995, the Tribunal decided to defer consideration of the case;

Whereas the facts in the case are as follows:

The Applicant entered the service of United Nations Office at Geneva on 8 January 1989 as an Associate Translator in the Russian Translation Section at the P-2 level, on a one-year fixed-term appointment, on secondment from the Government of the USSR. The Applicant's appointment was renewed several times. With effect from 1 August 1991, the Applicant was promoted to the P-3 level. From 1 April 1992, his appointment was extended consecutively without the status of secondment, through 7 February 1993, when the Applicant separated from the Organization.

The Applicant entered the service of the United Nations following completion of the United Nations Language Training Course at the Moscow State Pedagogical Institute for Foreign Languages, pursuant to an Agreement for Students, signed by the Applicant on 15 December 1987. Paragraph 3 of the Agreement for Students provides: "After you have successfully passed the final examination, the United Nations will offer you an appointment within the maximum period of two months subject to a satisfactory medical examination." Paragraph 4 provides: "You will agree to accept such appointment, subject to the United Nations Staff Regulations and Rules, for a minimum period of five years ..."

The Applicant's first three performance evaluation reports (PERs) following his appointment, covering the period from January 1989 to February 1992, rated his overall performance as "good", although several ratings on the third PER, covering the period of January 1991 to February 1992, were downgraded from prior ratings. In a memorandum to

the Chief of Language Services, dated 23 January 1991, the Chief of the Russian Section noted that the Applicant's performance "has been rather contradictory, i.e. even though he has been doing his best to improve his record, the quality of his work still leaves too much to be desired, with numerous revisers' complaints about distortions, mistranslations and so on". He therefore made no recommendation for the Applicant's promotion to the P-3 level.

In a subsequent memorandum to the Chief of Language Services, dated 26 July 1991, the Chief of the Russian Translation Section noted "there has been some improvement in the quality of work" of the Applicant, and recommended the Applicant's promotion to the P-3 level, which was implemented with effect from 1 August 1991. In a memorandum to the Chief of Language Services, dated 4 December 1991, the Chief of the Russian Translation Section stated that the Applicant's performance "still needs to improve to meet the required standard" and recommended an extension of his contract for one year.

On 6 April 1992, the Chief of the Russian Translation Section called a meeting of revisers, to discuss with the Applicant his performance. In a memorandum to the Chief of Language Services, dated 7 April 1992, not copied to the Applicant, the Chief of the Russian Translation Section transmitted minutes of the meeting, which he stated had been held because of "the continuously high number of revisers' complaints concerning the staff member's performance". He listed several particulars and further stated: "The revisers also noted that despite their efforts to help [the Applicant] and evident diligence on his part, there was no substantial change for the better ..." The minutes of the meeting were not transmitted to the Applicant or placed in his personnel file. In a statement, dated 4 October 1993, they were challenged by a staff member who attended the meeting as "not a true record of the proceedings".

In a memorandum to the Chief of Language Services, dated 27 November 1992, the Chief of the Russian Translation Section, referring to his memorandum of 7 April 1992 and the Applicant's "inadequate performance", recommended that the Applicant's fixed-term appointment not be extended upon its expiration. This recommendation was transmitted by the Chief of Language Services to the Chief of Personnel Services on 10 December 1991.

The Applicant's fourth PER, covering the period from March to December 1992, rated his overall performance as "fair". In this PER, the Chief of the Russian Translation Section, who was the Applicant's First Reporting Officer, noted that the Applicant "has failed to achieve any noticeable improvement in his performance which continues to be at an inadequate level".

In a memorandum dated 29 December 1992, the Officer-in-charge of the Personnel Administration Section informed the Applicant that with effect from 7 February 1993 he would be separated from service as the decision had been made not to recommend an extension of his appointment.

On 3 February 1993, the Applicant requested the Secretary-General to review the administration decision not to extend his appointment. On 9 June 1993, the Applicant lodged an appeal with the Joint Appeals Board. The Board adopted its report on 7 January 1994. Its conclusions and recommendations read as follows:

> "Conclusions and Recommendations
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> 46. The Panel concludes that the surrounding circumstances cannot be held as having created a legitimate expectancy of renewal of the Appellant's fixed-term appointment.
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> 47. The Panel further concludes that in spite of the fact that there are doubts casted [sic] on the procedures used by the Appellant's Supervisor and on his overall attitude towards the Appellant, it has no means to decide with any certainty as to what would have been the outcome if the proper procedures had been followed. Therefore it does not recommend reinstatement.
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> 48. However, the Panel finds that the Appellant's contentions were sufficient to have placed a burden of investigating the matter seriously in order to confirm or deny the allegations. Therefore, the Panel finally concludes that the Appellant has been injured by reason of flawed procedures and lack of due diligence on behalf of the Respondent in dealing with the Appellant's case.
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> 49. In view of the foregoing, the Panel recommends that the Appellant be compensated an amount equivalent to 12 months net base salary at the rate in effect at the date of separatior

50. The Panel makes no further recommendation in support of this appeal."

On 9 May 1994, the Under-Secretary-General for Administration and Management transmitted a copy of the Board's report to the Applicant and informed him as follows:

> "The Secretary-General has examined your case in the light of the Board's report and has taken note of the Board's conclusion that you did not have a legitimate expectancy of renewal of your fixed-term appointment.
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> The Secretary-General has also taken note of the Board's conclusion that you have been injured by reasons of flawed procedures and lack of due diligence on the part of the Administration and the Board's recommendation that you be given compensation. Although not in agreement with all of the Board's findings, the Secretary-General, in the interest of a satisfactory resolution in your case, has agreed that you be compensated an amount equivalent to 12 months net base salary at the rate in effect at the date of your separation from the Organization."

On 17 March 1994, the Applicant filed with the Tribunal the application referred to earlier.

Whereas the Applicant's principal contentions are:

1. The Applicant had a legitimate expectation, based on the Agreement for Students, that subject to satisfactory service he would be employed for a minimum period of five years.

2. The low ratings of the Applicant in his final PER were irrational and solely designed to support the decision of the Chief of the Russian Translation Section not to renew the Applicant's fixed-term appointment.

3. The decision not to renew the Applicant's appointment was based on extraneous factors and was part of a larger scheme by the Chief of the Russian Translation Section to vacate posts for his protégés.

Whereas the Respondent's principal contentions are:

1. The Agreement for Students does not obligate the Organization to provide the Applicant with five years' employment, nor does it provide a basis for asserting that the Applicant had a legitimate expectation that his contract would be renewed successively for a period of five years.

2. The Applicant's allegations of unfairness and prejudice are answered by the statement of his supervisor, denying those allegations.

The Tribunal, having deliberated on 24 July 1995, in Geneva, and again from 24 October to 21 November 1995, in New York, now pronounces the following judgement:

I. In the present case, the Applicant questions a decision awarding him compensation, deeming it to be inadequate in view of the injury sustained. The Joint Appeals Board recommended that the Applicant be compensated an amount equivalent to 12 months' salary by reason of the flawed procedure which resulted in non-renewal of his contract following four years of service in the Russian Translation Section of the United Nations Office at Geneva. The Secretary-General, without subscribing to all the findings of the Joint Appeals Board, none the less accepted the recommendation "in the interest of a satisfactory resolution". The Applicant has therefore already been compensated. The Secretary-General's decision is dated 9 May 1994.

II. The Tribunal, having been seized by the Applicant of an application for reinstatement in his post and an increase in the compensation received, was invited by the Respondent to review the entire case in the light of a document dated 29 July 1994, that is to say subsequent to the decision of the Secretary-General to accept the recommendation of the Joint Appeals Board. The document comes from the former Chief of the Russian Translation Section, who was the Applicant's supervisor in Geneva, and was sent from Bangkok where he has other

responsibilities. The former Chief of the Russian Translation Section, whose behaviour, according to the Joint Appeals Board, was critical to the flawed procedure concerning the Applicant, refutes the Board's findings and seeks to justify his own actions. The Tribunal, however, is seeking to determine whether, given the recommendation of the Joint Appeals Board, the Secretary-General's decision was reasonable. If the Secretary-General had wanted the Joint Appeals Board to take account of the additional explanations of the former Chief of the Russian Translation Section in Geneva, he should have submitted them in due time to the Joint Appeals Board. The Tribunal will therefore rule on the matter without taking into account the document sent by the former Chief of the Russian Translation Section in Geneva.

III. The Tribunal must, however, consider the Applicant's requests in so far as they relate to the consequences to be drawn from the flawed procedure resulting in non-renewal of his contract. It must rule on the issue of possible reinstatement of the Applicant and on the amount of the compensation awarded him.

IV. On the first issue, the Tribunal, in accordance with its past decisions on similar cases (Judgements No. 559, *Vitkovsky and Rylkov* (1992) and No. 713, *Piquilloud* (1995)) considers that it is not in a position to determine what the Administration would have decided if a proper procedure had been followed. As a result, the Tribunal will not order the reinstatement of the Applicant.

V. As to the amount of compensation, the Tribunal recalls that, according to the UNAT judgements followed by the Joint Appeals Board, the Agreement for Students, signed by the Applicant, did not obligate the Administration to keep the Applicant in its employ for a period of five years, but only bound the Applicant to five years' service, if offered. Accordingly, the Applicant's fixed-term contract did not imply a right of renewal. However, there is reason to believe that the Applicant's contract might well have been renewed for one year had the circumstances been other than those resulting from the flawed procedure which put an end to

his employment after four years.

The Tribunal therefore believes that, in awarding him compensation in the amount of one year's salary, the Joint Appeals Board and the Secretary-General properly assessed the compensation that was due the Applicant.

VI. For the foregoing reasons, the application is rejected.

(Signatures)

Jerome ACKERMAN
President

Hubert THIERRY
Member

Francis SPAIN
Member

New York, 21 November 1995

R. Maria VICIEN-MILBURN
Executive Secretary